Filed 7/19/05

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re JOSE P., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. JOSE P., Defendant and Appellant.	F045561 (Super. Ct. No. 02J0162D) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. George L. Orndoff, Judge.

Rebecca P. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Carlos A. Martinez and Catherine G. Tennant, Deputy Attorneys General, for Plaintiff and Respondent.

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts 3-6.

Following a contested jurisdictional hearing, the juvenile court sustained allegations of forcible rape (Pen. Code, § 261, subd. (a)(2))[1] and unlawful sexual intercourse (§ 261.5) against Jose P. (appellant), and committed him to the California Youth Authority (CYA) for a period not to exceed nine years.

Appellant contends the juvenile court erred in sustaining the forcible rape allegation. He further contends the juvenile court made various dispositional errors. We will remand for a new dispositional determination, but affirm the finding of forcible rape.

FACTS

Yvonne G. was 15 years old, and appellant 16, when she went to his house to "scam and jam"—which means to kiss and leave. She went there with her friend, appellant's cousin Susie, and Susie's boyfriend Daniel. Yvonne had seen appellant at a fair two years before and, recently, had spoken to him on the phone, but did not really know him.

It was around 8 p.m. when the group arrived. Appellant's mother was not home, but the husband of another of appellant's cousins was there. The two couples—Yvonne and appellant, and Susie and Daniel—smoked marijuana in appellant's room. Appellant turned out the lights, and the couples kissed.

After some 30 minutes, appellant and Yvonne moved to a different room. Appellant, who was bigger than Yvonne,[2] lifted her, set her down on the bed, removed her clothes, and lay on top of her. Yvonne did not object. She and appellant kissed, but when appellant started to put his penis into her vagina, Yvonne said, "Jose, no. I don't want to do this." Appellant stopped.

The two continued their encounter, with appellant kissing Yvonne's chest. Yvonne said at the hearing that this continued for six minutes. Appellant then again

---

[1]All further statutory references are to the Penal Code unless otherwise stated.

[2]At the time of disposition, appellant was five feet eight inches tall and weighed 190 pounds. Yvonne weighed 90 pounds.

began to attempt penetration, and Yvonne again said, "No, I don't want to do this." She said, "It hurts"; he said, "It will feel better." He penetrated her "a little bit," which was painful to her and caused her eyes to water. He did stop, though, when she told him to.

The two then talked, though appellant remained on top of Yvonne. They spoke about the time she saw him at the fair. After about five minutes, appellant tried again to achieve penetration. Yvonne told him to stop, but he continued until he "put it all the way in, just once" and, only then, did he stop. Yvonne did not pull away from appellant, because she couldn't. He was on top of her.

Yvonne got up and put on her bra and panties. Appellant, sitting on the bed, pulled her toward him and positioned her so that her legs straddled his. He kissed her and laid her back on the bed. She did not try to stop him because she was "scared" and "didn't know what to do." While holding her down by her shoulders, appellant rubbed his penis on her vagina over her underwear and "push[ed] himself on" her. She told him to stop and that it hurt, but he continued for "[t]wo or three minutes." He then put his fingers underneath her panties and tried to insert a finger into her vagina. Yvonne told him to stop, and she moved his hand away. When asked whether appellant had penetrated her vagina with his finger or "just rubbed it on top," Yvonne testified "I'm pretty sure. I really couldn't feel nothing. I was hurting down there. I really couldn't feel anything." The two then dressed.

Yvonne and Susie left by 10:00 p.m. Yvonne's shoulders, vagina and stomach hurt, and she had trouble walking. Yvonne told Susie appellant had tried to force himself inside her and that it had hurt. Yvonne was crying from pain and could not lie down.

Yvonne did not tell her parents about the incident until two days later. Her mother took her to the hospital because she complained about shoulder and stomach pain. At the hospital, she disclosed what had occurred.

On both direct and cross-examination, Yvonne acknowledged that appellant had never threatened her or attempted to stop her from leaving the room. She also admitted

that someone had opened the door while she was on the bed with appellant, but she had not asked for help. She explained that she had been too "scared. I was embarrassed. I didn't know what to do."

Defense

Appellant testified that he met Yvonne two weeks before the incident and had spoken to her on the phone about "hooking up," which he interpreted to mean having sex. Appellant thought Yvonne had come to his house for that purpose.

When Yvonne, Susie and Daniel arrived at appellant's, Yvonne pulled out a marijuana joint which all four of them shared. Yvonne and appellant started kissing and then went into a room together where Yvonne took off her clothes. The two had intercourse for 10 or 15 minutes. When Yvonne told appellant to stop, because it was hurting her, he stopped and told her to put her clothes on. Up to that point, Yvonne had done nothing to resist him.

When appellant stopped, Yvonne put on her panties and straddled appellant on the bed. She pushed appellant back and started rubbing her vagina on his penis. Appellant told Yvonne to stop, because she was teasing him and because his mother was coming home.

Susie testified that she and Yvonne had been friends for years. Susie thought appellant and Yvonne had been in a room by themselves from about 8:20 p.m. until just before 10:00 p.m. that night. Yvonne had looked happy when she came out of the room with appellant, and was hugging and kissing him. When the two girls left the house, Susie noticed that Yvonne had a big hickey on her neck. Yvonne later began crying and told Susie appellant's penis had hurt her, because it was "really large."

DISCUSSION

1. The charged offenses

Appellant was charged with forcible rape and unlawful sexual intercourse (§§ 261, subd. (a)(2), & 261.5), based on the same act, and also with felony sexual battery

(§ 243.4, subd. (a)) and forcible sexual penetration (§ 289, subd. (a)(1)). The prosecutor argued the sexual battery occurred after the rape, when appellant rubbed his penis on Yvonne's vagina through her panties. The prosecutor conceded that the fourth charge, relating to digital penetration, had not been proved. The trial court found not true both the digital penetration and the sexual battery,[3] but sustained the charges of forcible rape and unlawful sexual intercourse.

2. Forcible rape

Appellant contends there is no substantial evidence to support his conviction of forcible rape because there is no evidence of the use of force. We will affirm.

In considering appellant's claim of insufficiency of the evidence, we must determine only whether, on the record as a whole, any rational trier of fact could have found him guilty beyond a reasonable doubt. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Johnson* (1980) 26 Cal.3d 557, 576-578.) We view the evidence in the light most favorable to the prosecution, and presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We affirm if the circumstances reasonably justify the trier of fact's findings even if they might also be reconciled with a contrary finding. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.)

In *People v. Griffin* (2004) 33 Cal.4th 1015 (*Griffin*), the Supreme Court addressed the question whether "force" for purposes of our forcible rape statute must be shown to be '"*substantially* different from or *substantially* greater than' the physical force normally inherent in an act of consensual sexual intercourse." (*Id*. at p. 1023, quoting *People v. Cicero* (1984) 157 Cal.App.3d 465, 474, italics added in *Griffin*.) The court rejected the need for such proof: "To the contrary, it has long been recognized that

---

[3]Pursuant to section 243.4, subdivision (f), "'touches' means physical contact with the skin of another person whether accomplished directly or through the clothing of the person committing the offense."

'in order to establish force within the meaning of section 261, [former] subdivision (2), the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim].'" (*Griffin*, *supra*, at pp. 1023-1024, quoting *People v. Young* (1987) 190 Cal.App.3d 248, 257-258.) Thus, according to *Griffin*, the force requirement for purposes of section 261, subdivision (a)(2) has no special meaning outside the commonly understood definition of "force." Though the statute does require proof of both force (or one of the other statutory aggravators)[4] and lack of consent, force "'plays merely a supporting evidentiary role, as necessary only to insure an act of intercourse has been undertaken against a victim's will.'" (*Griffin*, *supra*, at p. 1025, quoting *Cicero*, *supra*, 157 Cal.App.3d at p. 475.) Thus, "even conduct which might normally attend sexual intercourse, when engaged in with force sufficient to overcome the victim's will, can support a forcible rape conviction." (*Griffin*, at p. 1027.)

In *Griffin*, the force consisted of the adult defendant pinning the minor victim's arms to the floor as he penetrated her vagina with his penis. The court found this was sufficient to show the defendant "used force … to accomplish intercourse against [the victim's] will" (*Griffin*, *supra*, 33 Cal.4th at p. 1029), and thus to support his conviction of forcible rape.

The evidence of force in *Griffin* was similar to that found sufficient in *In re John Z.* (2003) 29 Cal.4th 756, 763—to wit, grabbing the victim's waist, pulling her back down, and rolling her over to facilitate the continuation[5] of sexual intercourse. (*Griffin*,

---

[4]While the formal charge here was rape by force or fear of immediate and unlawful bodily injury, the prosecutor proceeded only on the theory of force. He conceded that any fear Yvonne felt was "just based on her simple inexperience we believe." Neither does the Attorney General here argue violation of section 261, subdivision (a)(2) on any theory other than force.

[5]*John Z.* resolved in the affirmative the question "whether the crime of forcible rape … is committed if the female victim consents to an initial penetration by her male companion, and then withdraws her consent during an act of intercourse, but the male continues against her will." (*In re John Z.*, *supra*, 29 Cal.4th at pp. 757-758.)

supra, 33 Cal.4th at p. 1028.) As noted in *Griffin*, that conduct would have been sufficient under any standard.

Appellant contends the evidence in *Griffin* and *John Z.* is different from the evidence here, because here there is nothing to show the exertion of any force other than that inherently involved in the act of penetration itself. We agree that this case is different from both *Griffin* and *John Z.* There is evidence that appellant did at one point hold Yvonne down, by placing his hands on her shoulders, but the record shows this happened in connection not with the rape but, instead, the subsequent through-the-clothes rubbing that occurred. In connection with the rape, we know only that appellant, who was twice her size, was on top of Yvonne when he penetrated her. While Yvonne did testify that she could not "pull away" because appellant was on top of her, there is no evidence that appellant used his weight as a means to achieve his end. We believe, nonetheless, that in the circumstances of this case, the force inherently involved in the penetration itself was sufficient.

In *Griffin*, the court cited with approval as to proof of force this court's opinion in *People v. Young*. (*Griffin*, *supra*, 33 Cal.4th at p. 1024.) There, we reversed because the evidence was insufficient to show that the rape was accomplished by means of fear of immediate and unlawful bodily injury. We noted there was, however, substantial evidence to show rape "by means of force and against [the victim's] will." (*People v. Young*, *supra*, 190 Cal.App.3d at p. 258.) The minor victim had testified that the adult defendant called her into his room, onto his bed, and under the bedcovers with him. He put his arms around her, sat her on top of him, pulled down her pants, and digitally penetrated her vagina. He made her "scoot down" and then put his penis into her vagina. We found it sufficient for purposes of section 261, former subdivision (2) (now subd. (a)(2)) that "some force was used by defendant in both the penetration and the physical movement and positioning of [the victim's] body in accomplishing the act." (*Young*, at p. 258.)

Respondent cites another opinion of this court—*People v. Jeff* (1988) 204 Cal.App.3d 309. There the minor victim testified the adult defendant told to her to lie down. He then "got on top of her, put his penis in her vagina and moved it up and down. [She] said it hurt when defendant inserted his penis." (*Id*. at p. 317.) The question whether this evidence was sufficient to show rape by force was not presented, because the case had gone to the jury only on the theory of rape by fear of immediate and unlawful bodily injury. We noted, however, that the evidence supported a finding that the rape had been against the victim's will because "some force was used by defendant in the penetration and physical movement involved and, at least in the beginning, it was painful for her." (*Id.* at p. 328.)

The circumstances in this case are as follows. There can be no doubt that Yvonne voluntarily and actively engaged in sexual foreplay with appellant, and that she continued to do so after he twice attempted penetration and was rebuffed. We know from the opinion in *John Z.*, however, that Yvonne's active participation in the encounter does not exclude her from the protection of our forcible rape statute. Though she did participate in the encounter, Yvonne made it clear to appellant, repeatedly and prior to penetration, both that she did not want to be penetrated and that appellant's efforts were both against her will and physically painful to her. Appellant, nonetheless, forced his penis into her vagina. Yvonne was left with pain in her vagina and stomach, and with difficulty walking.

We do not hold that, in all cases, the force inherent in the act of penetration is sufficient to show forcible rape; indeed, we think that as a general matter it is not. (See *Griffin*, *supra*, 33 Cal.4th at p. 1025 [noting conformity between law of rape and law of robbery]; *People v. Wright* (1996) 52 Cal.App.4th 203, 210 [force for purposes of robbery must be something more than "that which is needed merely to take the property from the person of the victim"].) What we do hold is that there is substantial evidence in

this case to show that, against the victim's will, appellant forced his penis inside her vagina and thus committed a violation of section 261, subdivision (a)(2).[6]

3. CYA commitment[*]

Appellant contends the juvenile court abused its discretion by committing him to CYA. Specifically, appellant claims the juvenile court did not consider reasonable alternative dispositions to CYA, that there was no basis for finding appellant would benefit from a CYA placement, that the only reason he was sent to CYA was to punish him for supposedly placing the blame on Yvonne, and that a CYA commitment would have extremely negative repercussions for him.

"A juvenile court's commitment order may be reversed on appeal only upon a showing the court abused its discretion. [Citation.] '"We must indulge all reasonable inferences to support the decision of the juvenile court and will not disturb its findings when there is substantial evidence to support them."' [Citation.]" (*In re Robert H.* (2002) 96 Cal.App.4th 1317, 1329-1330.)

"Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, receive care, treatment and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances." (Welf. & Inst. Code, § 202, subd. (b).) "To support a CYA commitment, it is required that there be evidence in the record demonstrating probable benefit to the minor, and evidence

---

[6]We recognize that *Griffin* and *John Z.*, and now this case, give section 261, subdivision (a)(2) a potentially broad application—to conduct that may, as a matter of policy, merit different treatment than other, more egregious forms of forcible rape. Forcible rape is considered a serious and a violent felony for purposes of sections 1192.7, subdivision (c)(3), and 667.5, subdivision (c)(3). Thus, it may not be enough to say that the difference in rapes can be addressed in the selection of term from the applicable sentencing triad. (See § 264.) It is for the Legislature and not us, however, to examine such questions of policy.

[*]See footnote, *ante*, page 1.

supporting a determination that less restrictive alternatives are ineffective or inappropriate." (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576.)

Applying these principles, we conclude the juvenile court did not abuse its discretion by placing appellant at the CYA.

Before ordering appellant's CYA commitment, the juvenile court expressly considered appellant's probation report, which described appellant's delinquency beginning in 1997 at age 10 when he was found in possession of a dagger on school grounds (§ 12020). Six months later he was cited for fighting on school grounds (§ 415.5, subd. (a)(1)). Both charges were handled informally with admonitions. At age 11, appellant threw a pencil at another student, which escalated into a fight. As a result, a "[b]oot program and Mental Health Referral" was made. Less than a month later, appellant was again cited, this time for battery (§ 242), and again admonished. In 2001, at age 13, appellant was cited for battery (§ 242), and 15 months later for possession of marijuana (Health & Saf. Code, § 11357, subd. (b)) and false identification to a peace officer (§ 148.9). Appellant was ordered to do 16 hours in a juvenile work program. Two months later, appellant was again cited for fighting on school grounds (§ 415.5, subd. (a)(1)) and this time ordered to serve six months' informal probation.

Appellant was adjudged a ward of the court in March of 2003 at age 15, when a sustained petition found he had possessed a false resident alien identification card (§ 472) and been disruptive in school (§ 626.8, subd. (a)). He was placed on formal probation and remanded to the Kings County Boot Camp, Alpha Program. Seven months later, appellant was readjudged a ward of the court for fleeing from a police officer while intoxicated (§ 148, subd. (a)(1)). He was placed on formal probation, to remain at home. The current matter occurred in March of 2004.

Based on this record, it is clear the juvenile court had before it evidence that prior attempts to rehabilitate appellant had been unsuccessful. It is also clear that the juvenile court considered dispositions other than CYA, but specifically determined appellant's

"mental and physical conditions and qualifications are such as to render it probable[] [t]hey will be benefitted by the reformatory educational discipline or other treatment provided by the youth authority." Under the purpose of the juvenile court law, the court's decision to commit appellant to CYA was reasonable given appellant's delinquent history and failure to reform under less restrictive warnings.

We find unavailing appellant's claim that the court failed to take into consideration that a CYA commitment would have negative repercussions for him because of the requirement that he register as a sex offender for life, pursuant to section 290, subdivision (d)(1). Defense counsel specifically argued this at the time of the disposition. We assume the juvenile court took this argument into consideration.[7] Also, appellant's claim is speculative. As acknowledged by appellant, section 290, subdivision (d)(5) contains a provision allowing a minor to be released from reporting requirements if his record is sealed under Welfare and Institutions Code section 781.

We also find unavailing appellant's contention that "the only reason the court sent him to CYA was to punish him for supposedly placing the blame for his predicament on Yvonne." At the disposition hearing, appellant provided the court with a letter in which he stated, "I realize I made a bad decision by messing with that girl. I honestly wish I would have never met her, because she set me up." After reading the letter the court stated: "The victim in this case was a young female and very foolish, but it's not against the law to be young, female and foolish. She put herself in a situation where a lot of bad things happened. But she is protected by the law from those things happening. [¶] The Court has found that [appellant] committed those acts and find him guilty of forcible rape and unlawful intercourse with the minor." The court went on to discuss, in detail,

---

[7]We also note that our Supreme Court in *In re Alva* (2004) 33 Cal.4th 254 concluded that "a requirement of mere *registration* by one convicted of a sex-related crime, despite the inconvenience it imposes, cannot be considered a form of 'punishment' regulated by either federal or state constitutional proscriptions against cruel and/or unusual punishment." (*Id.* at p. 268, fn. omitted.)

appellant's lengthy delinquent history, the current charges, and the impact the rape has had on the minor, before stating, "Then I look at the [appellant's] letter that he just gave me where he accuses the victim of setting him up. Now, this is the time, according to his own judgment, he supplied some of the marijuana for the marijuana that they were smoking that night. And of course the girl was still under age to be provided the marijuana. She brought her own, but he gave her some. He was out after curfew. It was going by like people on probation. He had sex with an under age girl. And the Court found that to be forcible sex. And since he feels it was the girl's fault, I guess any sympathy I might have had for [appellant] when [*sic*] out the window when he said the girl set him up." Defense counsel attempted to clarify that appellant, by using the words "set up," meant that Yvonne set up the date with him not that she set him up for a conviction of rape.

The letter was one piece of evidence the court was entitled to consider. While the court was certainly influenced by the letter written by appellant, it cannot be said that the court "focused primarily on a letter [appellant] wrote to the court" in making its determination. Other evidence in the record amply supports the juvenile court's decision to commit appellant to CYA.

4. Section 654[*]

Appellant was committed to CYA for eight years on the finding of forcible rape and an additional two months consecutive on the finding of unlawful sexual intercourse. Appellant contends the offenses were based on the same conduct and, for that reason, multiple punishment was unauthorized pursuant to section 654. Respondent agrees, as do we.

Section 654 prohibits punishment for two offenses arising from the same act. (*Neal v. State* (1960) 55 Cal.2d 11, 18.) "[S]ection 654 is statutorily applicable to

[*]See footnote, *ante*, page 1.

juvenile court sentencing where the court elects to aggregate." (*In re Billy M.* (1983) 139 Cal.App.3d 973, 978.) Therefore, appellant's commitment of two months for the unlawful intercourse finding must be stayed under section 654.

5. Concurrent sentencing[*]

The juvenile court ordered appellant to be committed to CYA until legally discharged with a maximum confinement time of nine years: eight years two months for the current offenses, plus six months consecutive for the January 31, 2003, prior adjudication and four months consecutive for the August 19, 2003, prior adjudication. Appellant contends the juvenile court erred by automatically imposing the consecutive terms without acknowledging it had discretion to impose the terms concurrently.[8] We disagree.

Where, as here, appellant had a meaningful opportunity to object to the court's failure to state reasons for its sentencing choice, appellant cannot raise the claim for the first time on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 356; *People v. Zuniga* (1996) 46 Cal.App.4th 81, 84 [counsel had opportunity to address court on sentencing issue].) The rule announced in *Scott* applies to juvenile cases. (*In re Jimmy P.* (1996) 50 Cal.App.4th 1679, 1685, fn. 8.) Appellant has therefore forfeited his right to raise this issue on appeal. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590.)

In any event, appellant's contention fails because the juvenile court was not required to make a record of its understanding that it had discretion to impose concurrent terms. Under Welfare and Institutions Code section 726, when the juvenile court commits a minor to CYA, it must specify the maximum term of confinement "which could be imposed upon an adult convicted of the offense or offenses which brought or

---

[*]See footnote, *ante*, page 1.

[8]Appellant's argument here as it pertains to the two months imposed for the unlawful sexual intercourse is moot in light of our earlier determination that the sentence imposed on that count be stayed.

continued the minor under the jurisdiction of the juvenile court." (Welf. & Inst. Code, § 726, subd. (c); see also § 731.) When multiple offenses have been adjudicated in one or more proceedings, that statute "gives the court discretion to run the terms consecutively or concurrently," and there is no requirement that the court state its reasons for that routine exercise of discretion. (*In re Jesse F.* (1982) 137 Cal.App.3d 164, 168-169; Welf. & Inst. Code, § 726, subd (c).)

"Evidence Code section 664 provides that '[it] is presumed that official duty has been regularly performed' and scores of appellate decisions, relying on this provision, have held that 'in the absence of any contrary evidence, we are entitled to presume that the trial court … properly followed established law.' [Citation.]" (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913.) Nothing in the record suggests that the court was unaware of its discretion under Welfare and Institutions Code section 726 or abdicated its responsibility under the statute. (E.g., *In re Jesse F., supra,* 137 Cal.App.3d at p. 168 & fn. 4 [juvenile court expressly stated it had to "'treat it like it's all running consecutive'"].) On the record before us, we presume the court exercised its discretion. (*People v. Moran* (1970) 1 Cal.3d 755, 762.) Because we reach this conclusion, we need not address appellant's alternative argument that he was denied effective assistance of counsel.

6. Welfare and Institution Code section 731 determination of maximum term of confinement in CYA[*]

In supplemental briefing, appellant contends the juvenile court failed to make a proper determination of his maximum term of physical confinement to CYA pursuant to the recent revision of Welfare and Institutions Code section 731. As of January 1, 2004, that section was amended to include the italicized language below: "A minor committed to the Department of the Youth Authority may not be held in physical confinement for a period of time in excess of the maximum period of imprisonment which could be

[*]See footnote, *ante*, page 1.

imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court. *A minor committed to the Department of the Youth Authority also may not be held in physical confinement for a period of time in excess of the maximum term of physical confinement set by the court based upon the facts and circumstances of the matter or matters which brought or continued the minor under the jurisdiction of the juvenile court, which may not exceed the maximum period of adult confinement as determined pursuant to this section.* This section does not limit the power of the Youth Authority Board to retain the minor on parole status for the period permitted by Section 1769." (Welf. & Inst. Code, § 731, subd. (b), italics added.)

In our recent decision, *In re Carlos E.* (2005) 127 Cal.App.4th 1529, decided after briefing in this matter was filed, we determined that, "[Welfare and Institutions Code s]ection 726 directs the juvenile court to determine the *maximum term of imprisonment* by choosing the longest period of incarceration applicable to an adult offender without regard to mitigating and aggravating circumstances. (§ 726, subd. (c).) Section 731 retains this requirement but 'also' requires the court to particularly set a *maximum term of physical confinement* in CYA 'based upon the facts and circumstances of the matter … which brought … the minor under the jurisdiction of the juvenile court.' 'Facts and circumstances of the matter' have absolutely no bearing on the question of the 'maximum term of imprisonment' that is determined pursuant to section 726.… Thus, the amendment to section 731 clearly sets forth a method based on the facts and circumstances before the court of determining the 'maximum period of confinement' in CYA, while retaining the longstanding requirement that the term determined by the court may not exceed the 'maximum period of imprisonment' as determined by section 726." (*In re Carlos E., supra*, 127 Cal.App.4th at pp. 1538-1539.) While "[Welfare and Institutions Code s]ection 731, subdivision (b) is a special statute dealing with the maximum confinement of a specific minor in CYA, … section 726, subdivision (c) is a

general statute, describing the generalized limitations on the aggregate amount of time one might be required to serve at any of the described placement facilities, including confinement in CYA." (*In re Carlos E., supra*, 127 Cal.App.4th at p. 1541.) Therefore, we determined the amended version of Welfare and Institutions Code section 731, subdivision (b) plainly required the juvenile court to set a maximum term of physical confinement in CYA, which may be less than the maximum period of adult confinement that would otherwise be warranted, based on the facts and circumstances of the matter or matters before it. (*In re Carlos E., supra,* 127 Cal.App.4th at p. 1542.)

At one point in the dispositional hearing, the juvenile court stated: "Then in accordance with Section 731 of the Welfare and Institution Code that maximum confinement time be set at eight years, two months." However, there is nothing in the record to indicate that the juvenile court was not referring to the-well established requirement in Welfare and Institutions Code section 731 that "A minor committed to the Department of the Youth Authority may not be held in physical confinement for a period of time in excess of the maximum period of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court.…" (*Id.*, subd. (b).)

There is nothing in the record to indicate the juvenile court determined the amended requirement that the "maximum term of physical confinement [be] set by the court based upon the facts and circumstances of the matter or matters which brought or continued the minor under the jurisdiction of the juvenile court, which may not exceed the maximum period of adult confinement as determined pursuant to this section." (Welf. & Inst. Code, § 731, subd. (b).)

Although a court is presumed to properly follow established law (*Ross v. Superior Court, supra,* 19 Cal.3d at p. 913), several factors lead us to believe that the juvenile court was unaware of the new requirement under Welfare and Institutions Code section 731. First, the amendment to the statute was new at the time of the dispositional hearing.

Welfare and Institutions Code section 731, as amended, became operative on January 1, 2004; the dispositional hearing was held four months later, on May 12, 2004. Second, no mention of the new requirement was made by the juvenile court and no argument as to a lesser term of physical confinement was made by counsel. Finally, no mention is made of a lesser term of confinement in the probation report, only the maximum imprisonment time allowed by law.

On this record, we agree that the juvenile court set the maximum term of confinement at nine years—based solely on what the maximum term an adult would face—and failed to set a maximum term of physical confinement in CYA based on the facts and circumstances of the matter before it.

DISPOSITION

The matter is remanded to the juvenile court to set a maximum term of physical confinement in CYA based on the facts and circumstances that brought appellant before it. In addition, the court is directed to stay the commitment imposed for count 2, unlawful sexual intercourse. In all other respects, the judgment is affirmed.

_____

DAWSON, J.

WE CONCUR:

_____

HARRIS, Acting P.J.

_____

WISEMAN, J.